U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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APR 27 2007

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:
SRC 06 217 50810

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Maura Deadrick
for Robert P. Wiemann, Chief
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides dentistry services. It seeks to employ the beneficiary permanently in the United States as a dentist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed above, the petitioner has not overcome the director's basis of denial.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on April 3, 2006. The proffered wage as stated on the ETA Form 9089 is $56.25 per hour, which amounts to $117,000 annually. On Part K of the ETA Form 9089, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner under the petitioner's "doing business as" name as of December 8, 2005.

On the petition, the petitioner claimed to have an establishment date in 1993, a gross annual income of $3.2 million, a net income of $1.4 million and 21 employees. In support of the petition, the petitioner submitted no financial documentation.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 13, 2006, the director issued a notice of intent to deny based on the lack of documentation relating to the petitioner's ability to pay the proffered wage.

In response, counsel stated that the petitioner had yet to file its 2005 tax return and submitted quarterly wage reports for 2005. The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on October 17, 2006, denied the petition. In her decision, the director noted the lack of evidence of payments to the beneficiary and concluded that the 2005 quarterly wage reports were not relevant to whether the petitioner had available funds to pay the proffered wage.

On appeal, counsel asserts that the payroll records demonstrated the petitioner's viability and ability to meet its payroll obligations. Counsel further asserts that the beneficiary did not begin working for the petitioner until September 2006. Thus, Forms W-2 were not available. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As will be discussed below, the record contains evidence suggesting that the petitioner actually hired the beneficiary in December 2005. Counsel asserts that "sample copies of checks" are enclosed. The petitioner also submitted its 2005 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns and a letter from [redacted] Chief Financial Officer (CFO) of Frontier Dental Management. [redacted] asserts that the petitioner's sole shareholder owns 33 percent of Frontier Dental Management and that the petitioner pays a "management fee" to Frontier Dental Management. [redacted] explains that the management fee "is based on the profitability of the practice each year. Therefore, the profit that is showed [sic] on the dental office is minimal [sic] to zero each year." [redacted] asserts that the management fee "will never put the dental office into a loss situation" and that Frontier Dental Management showed taxable income of almost $5,000,000 in 2005.

The petitioner's 2005 tax return reflects the following information:

| | |
|---|---|
| Net income | $1,049 |
| Current Assets | $18,689 |
| Current Liabilities | $28,196 |
| Net current assets | ($9,507) |

Statement one lists all of the petitioner's "other deductions" and includes a $1,013,936 "management fee." The pay statements covering August, September and November 2006 and derive from four different corporations, including the petitioner, three of which do business as [redacted] Only one statement reflects wages paid by the petitioner, a September 7, 2006 statement reflecting wages of $2,250 for the pay period from August 16, 2006 to August 31, 2006. While those wages are also listed as the beneficiary's year-to-date wages, the beneficiary's hire date is listed as December 8, 2005. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not resolved when the beneficiary began working for the petitioner. Regardless, the proffered wage over a two-week period amounts to $4,500, twice what the petitioner paid the beneficiary for the last two weeks of August 2006.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2005 or 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end

[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2005, the most recent year for which financial documentation is available. In that year, the petitioner shows a net income of only $1,049 and negative net current assets. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets in 2005.

We will not consider payments to the beneficiary by other corporations that may be related to the petitioner. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Similarly, management fee payments to Frontier Dental Management are not persuasive. The record does not contain the management contract between the petitioner and Frontier Dental Management. The petitioner has also not demonstrated that the sole owner of the petitioner is reducing the petitioner's corporate tax liability by distributing profits to himself. The petitioner's sole owner is only a 33 percent owner of Frontier Dental Management, according to [redacted] As such, the record does not establish that this "management fee" passes through to the petitioner's sole owner. Finally, the petitioner did not submit Frontier Dental Management's tax returns. As such, the record contains no evidence supporting [redacted]s assertion that Frontier Dental Management showed taxable income of nearly $5,000,000 in 2005.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage beyond those reflected on the tax return. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2006. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER**: The appeal is dismissed.